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No._____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

EDWARD GILHOOLY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Was a fair trial denied by the introduction, without limiting instructions, of massive hearsay evidence in violation of Federal Rule of Evidence 803 (8), which consisted of opinion, investigative reports and legal and factual findings from the office of the Attorney General of Pennsylvania to the effect that the petitioner was guilty of charitable frauds and misrepresentations?

2. Was the challenge to the introduction of the hearsay evidence properly preserved or, alternatively, was the introduction of the evidence, without limiting instructions, plain error?

Parties to the Proceedings

There are no other parties to this proceeding.

Besides the petitioner, Edward Gilhooly, the other defendants indicted in this case were: Pat Catapano, Marshall Sornik and Eva Knopf.

However, none of the other defendants appealed to the Court of Appeals or are petitioning for certiorari.

None of the other defendants appealed or are applying for a writ of certiorari.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

EDWARD GILHOOLY,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Edward Gilhooly respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 23, 1992.

Opinion Below

The opinion of the Court of Appeals affirming the conviction is in the form of a summary order not to be published in the Federal Reporter. A copy is set forth in the appendix to this petition, pp. A 1-3.

Jurisdiction

The certiorari jurisdiction of this Court is invoked under 28 USC 1254.

The judgement of conviction is dated March 26, 1992.

The order of affirmance by the Court of Appeals is dated October 23, 1992.

This petition is filed within 90 days of the order of the Court of Appeals.

Statement of the Case

Petitioner Edward Gilhooly was convicted on March 26, 1992 in the United States District Court for the Eastern District of New York, after a jury trial, of conspiracy to commit wire fraud (count 1), and four substantive counts of defrauding customers and banks (counts 2,4,5,6). He was acquitted of count 3, defrauding customers. (18 USC 371; 1343, 1344, 3551 et seq.).

The petitioner was indicted (CR 91-149) together with Pat Catapano, Marshall Sornik and Eva Knopf. Catapano pleaded guilty, and the remaining three defendants were tried together before Hon. Leonard D. Wexler and a jury. Defendant Sornik was acquitted on all counts except for the conspiracy, upon which the jury could not reach a verdict. The defendant Knopf was convicted on counts 5 and 6, involving defrauding banks.

The petitioner Gilhooly was sentenced to 4 years and 3 months (51 months) on each count, the sentences to run concurrently, and to 3 years of supervised release.

Statute Involved

Federal Rule of Evidence 803 (8) provides:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:...

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and

other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the source of information or other circumstances indicate lack of trustworthiness."

Statement of Facts

In September 1989 Edward Gilhooly was a businessman who operated several enterprises at 711-06 Koehler Avenue in RonKonKoma, Long Island, New York. These included two construction companies, an alarm company, an auto repair company, and a non-profit organization called Kid Watch, whose purpose was to aid abused and missing children and raise community awareness of this problem.

Kid Watch had been started by Gilhooly and George Steinhoff in 1985, and Gilhooly contributed over $100,000 of his own money to it. Kid Watch had a 24 hour 800 number hot line to supply information to parents and the community, and provide referrals to appropriate agencies. It organized a radio alert network with stations across the country to broadcast alerts and descriptions of missing children. It also produced missing children posters, educational videos and literature, and maintained a lending library of educational material. At times it maintained a trauma center for counseling and it was Gilhooly's "dream" to establish trauma centers across the country. At times Kid Watch achieved successes in locating missing children.

By September 1989, however, some Kid Watch activities had fallen off through lack of funds. Though it still maintained the

800 number hot line, manned by co-defendant Sornik, and though it still produced literature and posters, its radio alert program apparently was not being used, and its trauma center was not in operation, though Gilhooly was trying to reorganize it.

Into this setting came Pat Catapano, who coopted Gilhooly to begin a telemarketing coin company, Metro Rarities. The idea was to use an existing, but dormant merchant's account in the name of Kid Watch to charge credit cards. Catapano brought into the business as his salesmen two scoundrels, Stuart Cohen and Joseph Martone, who Catapano knew and had worked with in the past. Both had committed crimes while working at other coin companies, including running an "air-bagging" scheme where they would charge customers credit cards for coins that were never ordered. In addition, they would deliver phony sales pitches, send

coins that were never ordered, send coins of lesser quality than were ordered, or doctor coins to make them appear better than they were. With a merchant's account, they could receive immediate payment from the bank on credit card charges, and use the money from the account before complaints from customers could be processed.

Gilhooly was indicted for conspiracy and substantive crimes connected with the coin scheme run by Catapano, Cohen and Martone. In addition the conspiracy count charged Gilhooly with defrauding members of the public in connection with the solicitation of funds for Kid Watch, charging that he falsely represented that funds collected would be used to support an emotional trauma center and the radio alert network, whereas by September 1989, the government alleged, there was no longer a

trauma center in operation and no more radio alerts were being broadcast.

The main issue at trial, as far as Gilhooly was concerned, was whether Kid Watch was soliciting funds by misrepresentations and whether and to what extent he knew about, countenanced, or participated in the coin scheme run by Catapano, Cohen and Martone. Gilhooly was convicted on all counts except for count 3, an "air-bagging" count. The acquittal was undoubtedly based on admissions by Cohen and Martone that the "air-bagging" was their own idea, carried out behind Gilhooly's back. When Gilhooly learned about it, he disapproved and attempted to redress the situation.

On appeal, we argued that in this hotly contested trial grave error was committed by the admission into evidence of massive amounts of highly prejudicial hearsay. In

particular the government was allowed to introduce, through the testimony of Jeffrey Webb, an investigator from the Pennsylvania Attorney General's Office, a document containing findings of fact and conclusions of law from the Attorney General's Office that Gilhooly and Kid Watch had committed fraud and misrepresentations in violation of the State's Charitable Reform Act and Unfair Trade Practices Act. (Exhibit 2000, Appendix A 4-6). In addition, the report of the Attorney General's investigation also was allowed into evidence, listing in detail interviews with numerous people, none of whom testified at trial, and reporting their hearsay statements, beliefs, rumors and suspicions about Kid Watch. (Exhibit 200, Appendix A 7-12). Furthermore, Webb was allowed to testify to the hearsay opinion of a psychologist that Sornik was "an innocent

dupe" of Gilhooly "who was the responsible party." (R.737-8).

Incredibly none of this highly inflammatory and prejudicial hearsay opinion evidence was restricted by any limiting instructions from the trial court, despite objections and requests.

The excuse for the admission of the hearsay was that Sornik's attorney opened the door to it by his cross-examination of Webb. Though his cross-examination hardly opened the door to the massive amount of hearsay actually dumped into the case on rebuttal, Gilhooly's attorney never even cross-examined Webb and did not open the door to any of it as far as Gilhooly was concerned. But there was no redaction or limitating instructions as to Gilhooly. Thus Gilhooly's defense was swamped by hearsay totally inadmissible on his case.

The Second Circuit affirmed, writing that the objections and request for limiting instructions at trial were inadequate to preserve the point for review. The opinion does not discuss the substantive issue, except to conclude that the "contentions lacks merit." (Appendix, A 1-3). We believe that this summary opinion wrongly decided the preservation issue under the facts of the case, that it swept under the rug a denial of a fair trial, and let stand a serious breach of Federal Rule of Evidence 803 (8).

POINT

THE PETITIONER WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF MASSIVE HEARSAY EVIDENCE, WITHOUT LIMITING INSTRUCTIONS, TO THE EFFECT THAT GILHOOLY WAS GUILTY OF CHARITABLE FRAUDS AND MISREPRESENTATIONS.

The issues at trial, as far as the Petitioner was concerned, were whether Kid Watch misrepresented its activities and whether and to what extent he participated in or countenanced the coin frauds perpetrated by Metro salesmen Cohen and Martone. In this regard, Gilhooly's knowledge, intent to defraud, and wilfullness were important elements of culpability for both the conspiracy and substantive crimes.

In this setting, and in the heat of trial combat, the prosecutor succeeded in putting before the jury massive hearsay evidence consisting of opinion, investigative reports, and legal and factual findings from the office of the Attorney

General of Pennsylvania that Gilhooly and Kid Watch were responsible for charitable frauds and unfair trade practices. This sort of evidence is not allowed under Federal Rule of Evidence 803 (8), and its admission was not cured by any limiting instructions. The hearsay not only provided an official governmental finding and opinion on one of the precise counts before the jury, but it doomed Gilhooly's defense on the issues of intent to defraud, willfulness and knowledge with respect to all the counts.

The introduction of the hearsay at trial

Jeffrey Webb, an investigator from the Pennsylvania Attorney General's Office, was initially put on the stand to testify to an inconsistency he found in a statement by Sornik submitted during Webb's investigation of Kid Watch's charitable solicitations in

Pennsylvania. It seemed that Sornik had responded to the Attorney General's demand letter by stating that Kid Watch operated an emotional trauma center from January to November 1989. At the same time minutes of April 1989, submitted along with the letter, recorded a discussion only about an intention to establish the trauma center. Also submitted by Sornik were some names of people who would verify his claims.

On cross-examination, Sornik's attorney questioned Webb about his interviews with these people, a sociologist (R. 710-11), a Mr. Hoffman (R.717), and a Mr. Thompson (R.724, 726, 733). Counsel also sought to show that his client was "the innocent dupe of good intentions" (R.737). This appraisal had been made to Webb by a psychologist, La Rossa, who had dealings with Kid Watch and who Webb had spoken to on the telephone. Instead of confining his answer to Sornik

being the "dupe of good intentions", Webb went beyond the question to report the psychologist's opinion that Sornik was the dupe of Gilhooly, who was the actual culprit.

"Yes, he (the psychologist) did state that he felt Mr. Sornik was not the responsible party. He felt that it was Mr. Gilhooly...He stated that he (Sornik) was an 'innocent dupe'..." (R.737-8).

For some unknown reason, there was no objection to this hearsay opinion inculpating Gilhooly. There was also no sua sponte striking of the blatantly inflammatory testimony by the trial judge nor even limiting instructions that it could not be considered by the jury against Gilhooly for the truth of what was asserted.

The incident did not stop there, however. The government, seeking to counteract the implication that Sornik was

"an innocent dupe", then was allowed to elicit from Webb, this time over objection (R.742), "the conclusions that the Attorney General's Office reached as a result of their investigation." (R.742). Webb responded that "they reached the conclusion that Kid Watch had violated parts of the Charitable Reform Act and also unfair trade practices." (R.742). Asked who the Attorney General's office found was "involved in those conclusions", Webb testified, over objection, "Mr. Gilhooly and Mr. Sornik" (R.744).

Then, to compound this error, two documents from the Attorney General's Office were put into evidence through Webb: 1) Exhibit 2000, a letter from the Attorney General's Office to Gilhooly's attorney listing in detail misrepresentations and violations of the Charitable Reform Act and Unfair Trade Practices Act, and asking

Gilhooly to confess judgment to avoid the filing of a complaint (Appendix: A 4-6); and 2) Exhibit 200, Webb's own written report of his investigation detailing numerous interviews containing hearsay statements, opinions, rumors and feelings about Gilhooly and Kid Watch committing fraudulent practices. (A 7-12).

These documents, inadmissible hearsay in themselves, contained opinions, conclusions of fact and law, and patently inflammatory statements. They were allowed into evidence on the theory that Sornik's attorney had opened the door by his cross-examination (R.755-7). But whatever Sornik's attorney may have invited by this line of questioning, Gilhooly's attorney was not a party to it. Indeed, he did not cross-examine Webb at all (R.706). Thus, there was no opening of any door with respect to the Attorney General's opinion

regarding Gilhooly, nor of what the witnesses in their investigation said about him. Accordingly, this "evidence", if admissible at all, could only have been used against Sornik, and required, at a minimum, redaction or limiting instructions as to Gilhooly. But neither of these were done. To the contrary, an additional motion to give limiting instructions in the charge was expressly refused (R.1077-8; Appendix: A 13-14), and both exhibits went to the jury, along with all the other exhibits (1234), without any limitation as to their use. Indeed, in summation the government specifically recommended that the jury pay special attention to the Attorney General's conclusions in Exhibit 2000.

> "Members of the jury, when you review the evidence in this case, I will ask you to review the Government's Exhibit 2000 in evidence, which indicates the conclusions and the findings of the Pennsylvania Attorney General's office." (R.1206).

The hearsay exhibits

Exhibit 2000 (A 4-6) is a letter from a Deputy Attorney General of Pennsylvania to Gilhooly's then attorney, dated October 4, 1990. It asks him to tell Gilhooly that the Attorney General has completed its investigation about Kid Watch fund raising activity in Pennsylvania, contracted out to American Marketing Associates, but "promoted and arranged" by Gilhooly. (A4). The letter then states that telephone solicitations and mailings violated the Charitable Reform Act and Unfair Trade Practices and Consumer Protection Acts "by making the following misrepresentations or omissions of material fact." (A 5). Then it lists a) that there was no longer an emotional trauma center in New York, b) there was no emotional trauma center in Pennsylvania, c) there was no staffing in New York of an emotional trauma center by licensed and qualified counselors,

d) that a sampling of radio stations showed no radio alerts within the past two years, and some stations were not even aware of the program; e) that there was no 24 hour hot line, only an answering service that was "unable to counsel people's problems or provide information to those callers"; f) that Kid Watch was not properly registered by the Bureau of Charitable Organizations, g) that there was nothing to substantiate a claim of 90% success rate in the recovery of missing children; h) that donations for ads did not result in any ads ever being printed; and i) that Sister Adrianne Barrett's name was used without her permission to represent that she endorsed Kid Watch, when "such was not the case." (A 5).

The letter concluded by asking Gilhooly to refrain from further solicitations for 5 years, to make restitution of $3,750 raised

from Pennsylvania residents, and to pay $7,000 in fines and penalties for the cost of the investigation. Failing compliance, a complaint will be filed in court. (A 6).

Exhibit 200 (A 7-12) is Webb's investigative report on Kid Watch. It detailed how the investigation began from suspicions of the Director of Public Safety for Scranton and complaints from local social agencies, as well as "rumors" that Kid Watch was under investigation. (A 7).

It then pronounced its "Findings" about the trauma center and reported the suspension of the trauma center operations in New York in November 1988, and the following interviews with people who were not witnesses at the trial.

Robert Johnson, a policeman in Hauppage, NY, assigned to missing children services told Webb that he "was familiar

with Kid Watch, and not impressed." He didn't know of a trauma center. (A 8).

John Thompson of the AMA stated he was under the impression that Kid Watch had a trauma center. (A 8).

The report then turned to interviews of people whose names were supplied by Kid Watch. (A 9).

Louis LaRosa, a psychologist, stated he worked for Kid Watch for 4 weeks in 1987. He "never provided any counseling services or set foot in a trauma center." He was asked by Kid Watch to run a trauma center and set it up better. But "he does not think a trauma center existed at that time, and would be suprised if one had ever been started after that. He does not feel Kid Watch was organized, had the ability to set up a trauma center on their own and he was not comfortable being associated with them." (A 9).

Nancy Mamis, a social worker, told Webb that she never provided any counseling services for Kid Watch. She had given them some advice but "would not have worked for them as she did not feel they were professionals." (A 9).

Michael Hoffman, a social worker, stated he worked at the trauma center from January to October, 1988, 2-3 hours per week, counseling 12 people on the phone and in person. "Hoffman was very nervous talking to me about Kid Watch." (A 9).

Regarding the Kid Watch hot line, Webb's "Findings" included the following: (A 10-11).

Kathy Vennie, a Director of Child Adolescent Services in Scranton, had a man pose as a father who thought his daughter was abused. He called Kid Watch and was told to call information to locate the proper social agency. She also had a woman,

whose child was missing, call the hot line. This woman received "no help or advice from the representative, became frustrated with what she called 'a run around' and hung up." (A 10).

Webb wrote that he personally phoned the hot line, pretending to be calling for a friend whose child was missing for a day and a half. He was told that the parent would have to call and asked if he called the police. Webb asked what Kid Watch could do, and was told they would announce it on a participating radio station if one was in the area, otherwise they could print up posters.(A 10-11).

Contacting radio stations, Webb spoke to Bill Terry of WBLI in New York about Kid Watch radio alerts. Terry said they were initially involved in 1985-6 and received alerts to be aired "fairly frequently." They aired 40-50 alerts, and were succesful

in finding children. But they haven't heard from Kid Watch in 3 years. (A 11).

Other stations contacted by Webb in Philadelphia, Kansas, South Carolina, Connecticut and New York also reported initial activity but none since. (A 11).

"Miscellaneous Findings" reported that the county agency for child protection in Suffolk never heard of Kid Watch and that Sister Adrienne Barrett's name was used for publicity purposes without her consent. (A 11-12).

The law

Both Webb's investigative report and the letter from the Attorney General's Office with its findings of fact and conclusions are inadmissible hearsay. They are out of court statements presented for

the truth of the matter contained therein. Federal Rules of Evidence Sec. 803 (8) (b) excepts public records and reports from the hearsay rule, specifically "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel." Section 803 (8)(c) also keeps out "factual findings resulting from an investigation made pursuant to authority granted by law."

As held in United States v. Oates, 560 F.2d 45, 72 (2d Cir. 1977):

> "We thus think it manifest that it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases."

Moreover, there is no other hearsay exception that would allow such material into a case. Oates also stated this quite clearly.

> "[W]e hold here that in criminal cases reports of public agencies setting forth

matters observed by police officers and other law enforcement personnel and reports of public agencies setting forth factual findings resulting from investigations made pursuant to authority granted by law cannot satisfy the standards of any hearsay exception if those reports are sought to be introduced against the accused." 560 F.2d at 84, supra. To the same effect, United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978).

The typical reasons for excluding this kind of hearsay are applicable here. The witnesses interviewed by Webb are not subject to cross-examination. Their statements were not under oath, their accuracy cannot be questioned, their bias cannot be ascertained, the jury cannot observe their demeanor, and it is not known how accurately the investigator wrote down what was told to him.

Moreover, when it comes to the conclusions and findings of fact in the Attorney General's letter, such opinions are doubly objectionable because they usurp the function of the jury. e.g. United States v.

Brown, 540 F.2d 1048 (10th Cir. 1976); United States v. Barash, 365 F.2d 395 (2d Cir. 1966). Here, where the jury was supposed to decide, under the conspiracy count, whether Gilhooly perpetrated Kid Watch frauds and misrepresentations, the opinion of the Attorney General's Office that he did usurps the jury's function. Indeed, this official conclusion could hardly be more damning to the defendant, which is, of course, the reason why the prosecutor in his summation specifically asked to the jury "to review the Government's Exhibit 2000 in evidence, which indicates the conclusions and the findings of the Pennsylvania Attorney General's Office." (R.1206).

Preservation and opening the door

The Second Circuit held that 1) Gilhooly cannot rely on co-defendant

Sornik's request for limiting instructions "since that request did not seek the limitation as to which Gilhooly now claims the jury should have been instructed." (Appendix: A 2), and 2) that although Gilhooly objected to the government's redirect examination of Webb, the defense had opened the door to it. (ibid.).

As far as the request for limiting instructions is concerned, it is true that co-counsel began his request by trying to characterize what kind of document Exhibit 2000 was, and did not mention hearsay. However, he went on to cite a case, United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980), and asked that the jury be given "limiting instructions...under Lieberman." (R.1077-8; Appendix: A 13-14). Lieberman is a hearsay evidence case in which the court held: "to the extent that the hotel registration card was admitted for

non-hearsay purposes, Lieberman was entitled, if he requested, to a limiting instruction." 637 F.2d at 101, supra. Citing a specific hearsay evidence decision entitling the defendant to limiting instructions should be sufficient to make a request for limiting instructions in a hearsay situation, and to preserve the failure to give those limiting instructions for the appeal.

As far as opening the door is concerned, it will be remembered that Gilhooly's attorney did not even cross-examine Webb. (R.706). Thus Gilhooly didn't even knock on the door, much less open it up. Moreover, Sornik's attorney's cross-examination only tested Webb with regard to the people whose names Sornik gave him for verification, Dr. LaRossa, Mr. Hoffman and Mr. Thompson. If he opened the door, it would only be to Webb's report

regarding his interviews of these people, and then only in relation to Sornik. But Webb's report went much, much further. It also reported on interviews with Robert Johnson, Nancy Mamis, Leon Smith, Kathy Vennie, Bill Terry, Carmen Cassiano, Sister Adrienne Barrett and others, as to feelings, misgivings, rumors, suspicions and statements about Kid Watch. This went way beyond what was broached in the cross-examination. Indeed, many of the statements made in Webb's report also went far beyond any misrepresentations alleged in the indictment, which was limited to the trauma center and radio alerts. Here, it even included the allegation that Kid Watch used the name of a nun, Sister Adrienne Barrett, without her permission, a particularly inflammatory piece of "evidence." Just because an investigation is attacked on cross-examination as being

deficient in some aspect, doesn't mean that the entire investigative file can be dumped into evidence, particularly where it contains enormous amounts of prejudicial hearsay. To do so contradicts the whole idea of 803 (8)(c) of the Federal Rules of Evidence which excludes investigative reports. They are supposed to be "absolutely inadmissible" in criminal cases. United States v. Oates, 560 F.2d 45, 72 (2d Cir. 1977). At the very least, instructions to the jury that the hearsay statements could only be used to rebut the claim that the investigatiion was shoddy should have been given. But as it stands, the jury could have taken all the hearsay for the truth of the matter asserted, and, indeed, this was just what the prosecutor told the jury to do in his summation (R.1206).

Moreover, even if some of Webb's report could have been used in response to

cross-examination by Sornik, Gilhooly was entitled to redaction or instructions to the effect that it could not be used against him. e.g. United States v. Lieberman, 637 F.2d 95, 101 (2d Cir. 1980); United States v. Barash, 365 F.2d 395, 400 (2d Cir. 1966). But the hearsay evidence was admitted without any limitation at all. Indeed, in this case, the trial judge should have sua sponte given limiting instructions. Ultimately it is his responsibility to see that a trial in his courtroom is conducted fairly, and a responsible attitude requires the insertion of instructions limiting prejudice by the court regardless of the technical inexactitudes of the lawyers. "A trial judge need not sit like a 'bump on a log' throughout the trial." United States v. Mickens, 926 F.2d 1323 (2d Cir. 1991); United States v. Bejasa, 904 F.2d 137, 141

(2d Cir. 1985); United States v. Pisani, 773 F.2d 397, 403 (2d Cir. 1985).

Finally, under the facts of this case, the introduction of the hearsay evidence cannot be harmless error. Certainly with respect to the conspiracy count, there can be no such claim. The Attorney General's findings and conclusions impacted directly on the very issue the jury was supposed to decide - whether Gilhooly defrauded the public by Kid Watch misrepresentations. The Attorney General's report delivered their opinion that he did and he was, therefore, guilty of this count.

Moreover, the hearsay evidence affected all the other counts as well. For instance, in its charge, the court told the jury they had to find as elements of substantive counts, as well as the conspiracy an intent to defraud (R. 1225, 1250-1), wilfullness (R.1223, 1227-8, 1254), knowledge (R.1223,

1226, 1254) and false pretenses (R.1225). When the jury came to considering these elements the hearsay opinion "evidence" could only be decisive against the petitioner. For if Gilhooly was perpetrating knowing, wilfull and intentional frauds with regard to missing and abused children, he could hardly be less restrained when it came to credit card companies and banks. It destroyed any chance of convincing the jury that he was trapped in a web constructed by Cohen, Martone and Catapano; a web which he didn't help build but rather tried to tear apart when he came across it.

Where highly material evidence is wrongfully presented to the jury in a situation where they cannot realistically have considered it only with respect to the count for which it was submitted, then reversal on all counts is in order. e.g.

United States v. Barash, 365 F.2d 395, 400 (2d Cir. 1966).

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

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APPENDICES

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EDNY
91-cr-149
WEXLER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the city of New York, on the 23rd day of October one thousand nine hundred and ninety-two.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE ROGER J. MINER,

Circuit Judges,

HONORABLE LOUIS H. POLLAK*

District Judge,

* Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

United States v. Gilhooly, No. 92-1217

UNITED STATES OF AMERICA,

Appellee,

-v.- No. 92-1217

EDWARD GILHOOLY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

United States v. Gilhooly, No. 92-1217

Defendant Edward Gilhooly appeals from a judgment of the United States District Court for the Eastern District of New York entered following a jury trial before Leonard D. Wexler, Judge, convicting him on the one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371; one count of wire fraud, in violation of 18 U.S.C. 1343; and three counts of bank fraud, in violation of 18 U.S.C. 1344. On appeal, Gilhooly contends that there were errors in the trial court's evidentiary rulings and instructions to the jury. For the reasons below, we conclude that Gilhooly has failed to preserve most of his contentions for appellate review and that, in any event, all of his contentions lack merit.

United States v. Gilhooly, No. 92-1217

Absent a showing of plain error, a challenge to the introduction of evidence is not preserved for appellate review if the appellant has failed to object at trial. See United States v. Katz, 601 F.2d 66, 67 (2d Cir. 1979); United States v. Giraldo, 822 F.2d 205, 212 (2d Cir.), cert. denied, 484 U.S. 969 (1987); Fed. R. Crim. P. 52(b). Similarly, a failure to timely request limiting instructions at trial bars appellate review of the trial court's failure to provide such instructions. See, e.g., United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992); Fed. R. Crim. P. 30.

In the present case, Gilhooly's trial counsel did not object when his codefendant first elicited testimony from Webb that was unfavorable to Gilhooly.

Nor did he ask for a limiting instruction. His reliance on a codefendant's request for a limiting instruction is misplaced, since that request did not seek the limitation as to which Gilhooly now claims the jury should have been instructed. Though Gilhooly did object to questioning of webb by the government on redirect examination, his objection was properly overruled, as it was within the discretion of the trial court to rule that the defense had "opened the door." See generally United States v. Rea, 958 F.2d 1206, 1255 (2d Cir. 1992); United States v. Panebianco, 543 F.2d 447, 455 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977); 1 J. Wigmore, Evidence 15 (Tillers rev. 1983).

Gilhooly also contends that the court

erred in failing to instruct the jury that presence at the scene of criminal activity "even with knowledge" was insufficient to convict. Gilhooly did not object to the trial court's proposed instructions, and hence his present argument has been waived. See Fed. R. Crim. P. 30. Assuming, however, that an objection by one of his codefendants sufficed to preserve the question for Gilhooly's present appeal, the challenge has no merit. The charge read as a whole, see Cupp v. Naughten, 414 U.S. 141, 146-47 (1973), was not erroneous.

We have considered all of Gilhooly's arguments on this appeal and have found them to be without merit.

The judgment of conviction is affirmed.

AMALYA . KEARSE, U.S.C.J.

ROGER J. MINER, U.S.C.J.

LOUIS H. POLLAK, U.S.D.J.

GOVEKNMENT EXHIBIT 2000

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

October 4, 1990

ERNEST D. PREATE, JR.
ATTORNEY GENERAL

James Clark, Esquire
1600 Steward Avenue
Suite 205
Westbury NY 11590

RE: Commonwealth of Pennsylvania v. American Child Protective Association, Inc. a/k/a Kid Watch et al.

Dear Mr. Clark:

Since I was unable to reach you by telephone, I decided to place the purpose of my call in writing. I have been informed that you represent Edward "Jim" Gilhouley. That being the case, I did not want to contact him directly, but rather wanted to inform you of the nature of the Pennsylvania Attorney General's

investigation against Mr. Gilhouley, Marshall Sornik and Kid Watch. Although Mr. Gilhouley may not be aware that our investigation is closed, I was hoping that you, as his counsel, could relay this information to him. If, however, you do not represent Mr. Gilhouley in this matter, I would appreciate it if you would be so kind as to advise me to whom I should direct this letter.

As I mentioned above, my office has completed its' investigation of Kid Watch's fundraising efforts and activities in Northeastern Pennsylvania and the role of Edward "Jim" Gilhouley and Marshall Sornik in those solicitations. Our investigation revealed that Jim Gilhouley promoted and arranged for the

establishment of a Kid Watch operation and solicitation campaign in Scranton. Kid Watch then contracted with American Marketing Associates, Inc., to conduct telephone solicitations of area residents and businesses in Scranton for donations which were to benefit the Kid Watch program. The purpose of raising money was for: (a) retrieving lost and abducted children; (b) conducting educational programs to increase public awareness of abduction and abuse of children; (c) occurrence of such a loss at a trauma center to be established in Scranton; and (d) publishing for each donation and advertisement in a journal of supporters listing every contributor.

In the course of these telephone

solicitations and through literature developed about Kid Watch mailed to contributors, Respondents engaged in conduct violative of the Charitable Organizations Reform Act, Act of April 30, 1986, PL.107, No.36, as amended, 10 P.S, 161.1 - 161.20 and the Unfair Trade Practices and Consumer Protection Law, Act of December 17, 1968, P.L.1224, No.387, as amended, 73 P.S. 201-1 - 201-9.2, by making the following misrepresentations or omissions of material fact: (a) that an "emotional trauma center" existed in New York and the counseling was currently being conducted there, when, in fact, no such facility existed at the time of the solicitations in Pennsylvania; (b) that a trauma center would be established in

Pennsylvania when, in fact, no such facility was ever established; (c) that the New York Trauma Center was staffed by licensed and qualified counselors, when, in fact, no such facilities existed at the time solicitations were being conducted in Pennsylvania; (d) that an active radio alert network existed when, in fact, a random sample of radio stations involved showed that many stations were not contacted since their initial enrollment and others which received some calls initially, have not had any follow-up follow-up contact for at least two (2) years, and some stations contacted ere not even aware of the program; (e) that a 24-hour hotline was available to callers when, in fact, often only an answering

service responded that was unable to counsel people's problems or provide information to those callers; (f) that Kid Watch was registered with the Department of State, Bureau on Charitable Organizations to conduct charitable solicitations when, in fact, it never completed the registration as required by the Bureau on Charitable Organizations; (g) that there was a 90% success rate in the recovery of missing children when, in fact, there is nothing to substantiate this claim; (h) that for each donation made, a corresponding ad would be printed in a journal when, in fact, no ads were ever printed; (i) that Sister Adrianne Barrett's name was used, without her permission, to represent that she endorsed

the Kid Watch program when, in fact, such was not the case.

Basically, what we are seeking by means of this demand letter is that Respondents:

1. Refrain from soliciting funds by any method or means in the Commonwealth of Pennsylvania for a period of five (5) years;
2. Make complete restitution of the $3,750 raised from Pennsylvania residents fraudulently;
3. Make payment of $7,000 to be divided equally between fines/penalties and costs of investigation to the Commonwealth of Pennsylvania.

If we are not able to reach agreement

on these terms, then it will be necessary for me to file a Complaint against the Respondents named above in he Commonwealth Court of Pennsylvania.

Please advise me of your client's decision by October 22, 1990.

Very truly yours,

Mary Beth O'Hara Osborne

Deputy Attorney General

MBO/lak

GOVERNMENT EXHIBIT 200

COMMONWEALTH OF PENNSYLVANIA

Office of Attorney General

OCTOBER 27, 1989

SUBJECT: Kid Watch

TO: File

FROM: Jeff A. Webb

Special Investigator

This memo relates the finding of an investigation of The American Child Protective Association, Inc., and their "Kid Watch" program (Kid Watch). Kid Watch began fund raising in Scranton, PA, in June, 1989. The professional fund-raiser involved was American Marketing Associates (AMA), owned by John Thompson and John Dileo. We began our investigation following an inquiry from John J. Devine, Business Administrator and Director of Public Safety for the city of

Scranton. Devine was concerned, because the Mayor was scheduled to issue a proclamation involving Kid Watch, and he had heard complaints from local social agencies about the organization and also rumors that Kid Watch was under investigation by our office.

In checking with the Bureau of Charitable Organizations, we discovered that Kid Watch had filed a registration form on May 22, 1989. Because their 1988 financial information was not provided, they were not issued a registration. AMA was properly registered to conduct charitable solicitations. A demand letter was sent to Kid Watch on July 26, 1989. Since the demand letter, Kid Watch has registered with Bureau.

Kid Watch is a not-for-profit organization whose purpose, according to them, is to retrieve lost and abducted

children, conduct educational programs to increase public awareness of abduction and the abuse of children and to counsel children and parents emotionally effected by the occurrence of this in their family.

The purpose of this investigation is to determine if Kid Watch performs the services it purports and to solicited for.

The following wee areas on which the investigation focused:

TRAUMA CENTER

While soliciting in Scranton, Kid Watch, through their professional fund-raiser, American Marketing Associates, stated that they opened a trauma center in New York in 1987. This center, according to the Kid Watch promotional letter which was used by the professional fundraiser to inform contributors about Kid Watch and their programs, stated that the trauma center provided individual, group and peer

counseling and implied that the center wa still in operation at the time of the solicitation.

FINDINGS

1. Kid Watch states, by its own admission, that the trauma center opened in January, 1988, at 292 Hoffman Lane in Happaugue, NY. (See response to demand letter.)
2. In the minutes of an April 14, 1989, board meeting, dated June 9, 1988, provided by Kid Watch, it is reported that "an amendment was presented to establish an Emotional Trauma Center at 292 Hoffman Lane". This suggests that the trauma center still did not exist by this date. (See response to demand letter.)
3. We also know, by the admission of Kid Watch, that the trauma center

operations were suspended in November, 1988. (See response to demand letter.)

4. On July 25th, I contacted Robert Johnson, a policeman in Hauppauge, NY, assigned to missing children and juvenile services (see July 25 memo). Johnson was familiar with Kid Watch, and not impressed. He had no knowledge of a Kid Watch trauma center in Hauppauge or anywhere else. He stated that in his work he dealt with more troubled kids that he could handle, and would be aware of a center where children could receive counseling, if it existed.

5. In an October 13 interview with John Thompson of AMA, he stated

that he was under the impression, from Kid Watch, that the trauma center was being operated out of their present address of Koehler Avenue on an appointment only basis. Thompson also confirmed that the promotional letter, referred to above, was used as an information source for solicitors and was sent to contributors when requested. As stated in 3 above, the center ceased operations in 1988, upon moving to the Koehler Avenue address.

In their reply to our demand letter, Kid Watch supplied our office with the names of four (4) licensed professional counselors who provided services for the trauma center. I interviewed three (3) of these counselors, and the finding are as follows:

1. Mr. Louis LaRosa, psychologist New York State,#732.

He stated that he worked for Kid Watch for approximately four weeks in the end of 1987. LaRosa never provided any counseling services or stepped foot in a trauma center. LaRosa stated that when he was contacted, Kid Watch gave him the impression that a trauma center existed and that they wanted him to run it and set it up better. He stated they were soliciting at this time, and claiming to have a trauma center. He does not think a trauma center existed at that time, and would be surprised if one had ever been started after that. He does not feel Kid Watch was organized, had the ability to

set up a trauma center on their own and he was not comfortable being associated with them.

2. Nancy Mamis, Master of Social Work, NYS #035033.

She stated she never provided any counseling services for Kid Watch and did not work for them. She only, at the insistence of a friend, advised Kid Watch on a proposal for them to work in conjunction with a hospital that had an emotional trauma facility. She advised them to contact Long Island College Hospital. She stated this was in 1987. She never was aware of a Kid Watch trauma center, and would not have worked for them as she did not feel they were professionals. She stated their proposal was

very weak.

3. Michael Hoffman, Master of Social Work, NYS #018078.

Hoffman stated he worked at the trauma center from January, 1988, to October 1988. He worked 2 to 3 hours per week and stated he counseled 12 people both in person and over the phone. Hoffman was very nervous talking to me about Kid Watch. He stated he did not know any other counselors who worked there and that Sornick was his boss.

4. Robert Moore, Certified Alcohol Counselor.

I cannot locate Moore.

I contacted a number of businesses in Scranton that were solicited for Kid Watch. Two that recalled the presentation and discussion of the trauma center are:

1. On November 14 I contacted Leon Smith of Champion Ford, 118 Linden Street, Scranton, PA 18501. The phone number is 347-5611. Smith was contacted in July and donated $100.00. He told the solicitor, Mary Smith, that he wanted some information on the Kid Watch, and was sent the letter explaining all of the Kid Watch's programs and that the trauma center opened in 1987 and was still in operation. It was his belief that the trauma center did exist in New York.

2. On November 14 I contacted Mrs. Heinz of Bearly Used in Scranton, PA. The phone number is 342-2327. Heinz was solicited in July and donated $25.00. She was told that this was for and ad in

a Kid Watch publication, and that there was an existing trauma center in New York. The donation was to be used to expand the trauma center.

1-800-KID WATCH HOT LINE

Kid Watch has a phone line set up to receive calls 24 hours a day. This is to be used to call in missing children reports, to call if you've seen a child that was reported missing over the radio alert network, or to call for advice and information on child abduction and abuse.

FINDINGS

1. Kathy Vennie, Director of Child Adolescent Services for the City of Scranton contacted 1-800-KID WATCH. She had a man pose as a father who thought his daughter had been abused while at her mothers. He was told by the Kid

Watch representative to use his best judgment as to whether the child needed help and then call information to locate the proper social agency.

2. Vennie also had a woman, whose child is missing, contact the hot line. The woman, who receive no help or advice from the representative, became frustrated with what she called "a run around" and hung up.

3. I personally contacted the hot line on October 27 and stated I was calling for a friend whose son had been missing for a day and a half. The representative first told me that the parent would have to call and asked if the police had been notified. I then asked what Kid Watch could

do. He replied that they would announce it on a participating radio station, if one was in the area where the boy was missing. If not, they could get posters printed up.

RADIO ALERT NETWORK

Kid Watch claims and has provided documentation of approximately 65 radio stations which participate in the alert network. Started in 1985, this is to provide an immediate response to a missing child, by providing information to the public on the child. When an alert is aired sightings can be called into the hot line.

FINDINGS

1. I spoke with Bill Terry of WBLI in New York. The phone number is 516-732-1061. Terry stated that

they were the first station involved. Initially, in 1985 and 86, Terry claims that they received alerts to be aired fairly regularly. He estimated that they aired a total of approximately 40 to 60 alerts. Kid Watch was responsible for calling in the alert and informing the station when children were found due to an alert. He said that they were successful in finding children, but could not remember how many. Terry stated that they have not heard from Kid Watch in about 3 years, and estimated the last alert aired in April 1986 or 87. He had no explanation for this. Most of the alerts concerned children missing from shopping

malls or missing for 24 hours.

2. I was able to contact other stations involved in the network. These were: Eagle 106 out of Philadelphia,involved since November, 1987,; Power 104 FM out of Kansas, involved since December, 1987; and WANS 107 out of South Carolina, involved since January, 1988. Of these three, none has been contacted by Kid Watch since they became involved. Lite 92.5 FM, out of Connecticut became involved approximately 3 years ago. They had 2 alerts aired the first year and have not heard from Kid Watch for approximately 2 years. WRKL of New York also had activity in their first year, 3 alerts in 1986, but have not heard from Kid

Watch in 2 years.

MISCELLANEOUS FINDINGS

1. Carmen Casiano of the Child Protective Agency for Suffolk County, New York, had never heard of Kid Watch. This is a county agency in the same county that Kid Watch is based.
2. Kid Watch used Sister Adrianne Barrett's name, for publicity purposed without her consent.

JAW/ls

cc: MAMc

SCA

MR. HOLTZMAN: Can he wear a robe?

MR RUBENSTEIN: May I borrow your robe? As to -- I don't know your first portion of the charge.

THE COURT: I'll give you a copy.

MR. RUBENSTEIN: Do you have things on a criminal records and drug users?

THE COURT: Not on drug users, no. Just on -- I'll give you a charge on prior felony.

MR. RUBENSTEIN: I would ask Your Honor to charge in view of the evidence that has been introduced into this case, I think it was Exhibit 2000, which was a letter put in through Mr. Webb, and that letter is in fact, Your Honor, an offer and compromise to a lawyer and it is less that an indictment. It is less than a

complaint. And I think that Your Honor should give some limiting instruction as to the value of such a letter.

THE COURT: I don't understand even what the letter is? What are you talking about.

MR. RUBENSTEIN: The government on redirect put in, I think it's Exhibit 2000, maybe 2001, a letter that purported to be some official document of a finding of the Attorney General of Pennsylvania, when in fact it was nothing more that an offer and compromise.

THE COURT: I will not comment on that. You are the one who brought it out.

MR. RUBENSTEIN: But the jury should be informed of how they can use it and view it. The fact of the matter is --

THE COURT: I'll let you comment on it.

MR. RUBENSTEIN: I think they should have some guidance from the Court as far as what the law should be on stuff like that. Your Honor, I would want you to file with my charges the limiting instruction I asked you for under Lieberman, as to the names, that Your Honor has indicated you would decline to so charge. I would want it filed as part of my request to charge.

THE COURT: What is that?

MR. RUBENSTEIN: That was the evidence of peoples' names, Sornik, where

someone said they called up and spoke to a Marshall or a Marshall Sornik.

THE COURT: I declined that, yes. You can file it. We'll make it a Court 6.

MR. RUBENSTEIN: 638 F.2d 95, U.S. v. Lieberman.

MR. HOLTZMAN: With the exception of Mr. Rubenstein's request relating to mistake, I would join in his request to the extent you would refuse to charge them, I would respectfully take an exception as to --

THE COURT: As to what portion, everything?

MR. HOLTZMAN: Your Honor, I read his request and I agreed with them, except --